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<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional)  <b>LOREAL 3.0-003</b>						
<table border="1"> <tr> <td>Application Number  <b>10/812,349</b></td> <td>Filed  <b>December 12, 2003</b></td> </tr> <tr> <td colspan="2">First Named Inventor  <b>Bertrand Lion</b></td> </tr> <tr> <td>Art Unit  <b>1615</b></td> <td>Examiner  <b>B. P. Barham</b></td> </tr> </table>			Application Number  <b>10/812,349</b>	Filed  <b>December 12, 2003</b>	First Named Inventor  <b>Bertrand Lion</b>		Art Unit  <b>1615</b>	Examiner  <b>B. P. Barham</b>
Application Number  <b>10/812,349</b>	Filed  <b>December 12, 2003</b>							
First Named Inventor  <b>Bertrand Lion</b>								
Art Unit  <b>1615</b>	Examiner  <b>B. P. Barham</b>							

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

applicant /inventor.

assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b)  
is enclosed. (Form PTO/SB/96)

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September 15, 2009

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**NOTE:** Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

\*Total of 1 forms are submitted.

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited with the U.S. Postal Service on the date shown below with sufficient postage as First Class Mail, in an envelope addressed to: MS AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

ARGUMENTS IN SUPPORT OF PRE-APPEAL BRIEF REQUEST FOR REVIEWINTRODUCTION

In the final Office Action, the rejections of claims 1-4 and 6-24 as obvious, have been maintained. In doing so, it has been conceded that the evidence presented in the Declaration Under 37 C.F.R. § 1.132 of Pascal Arnaud demonstrates unexpected results. However, it is alleged that the unexpected results are limited to a single species and are not commensurate in scope with the claims.

Contrary to the Examiner's position, Mr. Arnaud determined that the data presented support a conclusion that the class of polymer dispersions recited in the claims performs unexpectedly better than the class of polymers taught by Suzuki. (See Arnaud Declaration, ¶ 12.) Thus, the Examiner has failed to properly consider the declaration for all that it teaches. Moreover, the Office Action is devoid of any evidence or reasoning why one of skill in the art would not take Mr. Arnaud's declaration at face value.

Absent such evidence or reasoning, the conclusion reached by Mr. Arnaud stands completely unrebutted. For this reason, the Examiner's reasoning is insufficient to sustain the rejections of the claims in the face of the objective indicia of nonobviousness.

II. 35 U.S.C. § 103 Rejections

All of the pending claims have been finally rejected under 35 U.S.C. § 103(a) as unpatentable over Suzuki, et al., U.S. Patent 5,219,560 ("Suzuki"), and also over Torgerson, et al., WO 93/23446 ("Torgerson") as evidenced by Mougin, et al., U.S. Patent 5,851,517 ("Mougin"). (Paper No. 20090610 at 3 and 5.) In the previous Response (filed March 18, 2008), the Applicant presented declarations containing clear evidence of

the unexpectedly better transfer resistance properties of a cosmetic composition containing the inventive polymer dispersion as compared to a cosmetic composition containing a graft copolymer made from the polymerization of a dimethylsiloxane and methyl acrylate, such as that of the closest cited prior art — Suzuki.

In the final Office Action, it was conceded that the results presented in the declarations are sufficient to show unexpected results, and therefore, demonstrate nonobviousness. (Paper No. 20090610 at 2.) However, it was alleged that the results are sufficient only for the specific inventive composition tested:

[the results] are sufficient for the specific instance of a medium of decamethylcyclopetasiloxane and a polymer of methylacrylate, methacrylic acid, and monomethacryloxypropylpolydimethylsiloxane, the instant claims are drawn to a much broader scope and there is not a single claim that claims this narrow embodiment nor any showing that any other embodiment within the broad scope also has this unexpected result.

(*Id.*) The Office has concluded that the results are not commensurate in scope with the claims:

It refer(s) only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims.

(*Id.*)

However, this position ignores the conclusions made by Pascal Arnaud based on the experimental results presented. Mr. Arnaud's conclusion is not just that the single inventive composition is unexpectedly better than the comparative composition. Instead, Mr. Arnaud concludes that:

Based on my knowledge and experience in the field of cosmetic foundations, I believe that a person of ordinary skill in the art would not have expected that a cosmetic composition containing a dispersion of a polymer with a

*skeleton containing a C<sub>1</sub>-C<sub>3</sub> (meth)acrylate and acrylic acid and/or methacrylic acid, as claimed, would exhibit an increase in transfer resistance over a polymer without acrylic acid or methacrylic acid. Thus, in my opinion, the result obtained, which in this case was a 7-fold increase in transfer resistance, was unexpected.*

(Declaration of Pascal Arnaud, ¶ 12 (emphasis added).) Thus, Mr. Arnaud concludes that the data presented support a conclusion that the class of polymer dispersions recited in the claims performs unexpectedly better than the class of polymers taught by Suzuki.

In rejecting the results as not commensurate in scope with the claims, the Examiner has apparently concluded that a declaration presenting unexpected results based on a single comparative example cannot be sufficient to support claims to a genus. However, there is no such *per se* rule for the consideration of evidence of unexpected results:

NONOBVIOUSNESS OF A GENUS OR CLAIMED RANGE MAY BE SUPPORTED BY DATA SHOWING UNEXPECTED RESULTS OF A SPECIES OR NARROWER RANGE UNDER CERTAIN CIRCUMSTANCES

The nonobviousness of a broader claimed range can be supported by evidence based on unexpected results from testing a narrower range if one of ordinary skill in the art would be able to determine a trend in the exemplified data which would allow the artisan to reasonably extend the probative value thereof. *In re Kollman*, 595 F.2d 48, 201 USPQ 193 (CCPA 1979)

M.P.E.P. § 716.02(d)(I).

In applying this *per se* rule to the Applicant's evidence of unexpected results and ignoring Mr. Arnaud's conclusion, the Examiner has failed to properly consider the evidence of unexpected results for all that it teaches. In short, The Examiner has not presented any evidence or reasoning why one of skill in the art would have doubted Mr. Arnaud's conclusion.

Absent such evidence or reasoning, the conclusion reached in the Arnaud Declaration stands completely unrebutted. In sum, the record contains unchallenged evidence that the class of polymer dispersions claimed possesses unexpectedly better transfer resistance properties than the class of polymers taught by *Suzuki*. For this reason, the Examiner's reasoning is insufficient to sustain the rejections of the claims in the face of these objective indicia of nonobviousness.

### **III. PREVIOUS ARGUMENT**

A detailed discussion of the rejections and the applicability of the unexpected results presented in the Declarations Under 37 C.F.R. § 1.132 of Bertrand Lion and Pascal Arnaud can be found in the previous Response mailed March 10, 2009 at pages 2-8. In addition, both of these Declarations accompanied the previous Response and have been made of record in the captioned case.

### **IV. CONCLUSION**

It is submitted that these unexpected results establish that the claimed invention is nonobvious and patentable. Accordingly, reconsideration and withdrawal of both of the rejections<sup>1</sup> and allowance of the pending claims are respectfully requested.

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<sup>1</sup> As discussed in the previous Response, the teachings of *Suzuki* are closer to the claimed invention than are the teachings *Torgerson*. Thus, these unexpected results also establish that the claimed invention is nonobvious and patentable over *Torgerson* as evidenced by *Mougin*.